Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

JAMIE MESSENGER,

Petitioner,

v.

GRUNER + JAHR PRINTING AND PUBLISHING,
also known as GRUNER + JAHR, USA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a trial judge and jury determine that a media defendant published an article falsely reporting upon a professional model's life with knowledge of the falsity or in reckless disregard of the truth, can the Circuit Court and Court of Appeals hold that the First Amendment privilege of newsworthiness prohibits liability without contravening the express mandates of *Sullivan*[1], *Time Hill*[2], and their progeny?

2. Have the Circuit Court and Court of Appeals violated Federal First Amendment jurisprudence, the law of the State of New York, and the decisions of States sister to New York, by creating an absolute immunity for a media defendant to interweave photographs with an article that knowingly identifies plaintiff as the subject of a fictional account?

3. Have the Circuit Court and New York Court of Appeals traversed accepted Constitutional boundaries by rendering New York a safe haven in the Internet Era for the media's knowing publication of photographs interwoven with text in a manner that falsely presents a person's autobiography causing her mental distress?

4. Can the New York Courts preclude a plaintiff from proffering evidence of, and obtaining punitive damages for, the grossly irresponsible fabrication of an article that is interwoven with her images in a manner that creates the false impression in the ordinary reader's mind that she is the subject of the article?

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1. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

2. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

LIST OF PARTIES TO THE PROCEEDING

The petitioner, Jamie Messenger, the plaintiff below, was a minor when this action was commenced, and hence represented by Donna Messenger, her mother and "next friend." She has since reached the age of majority. The petitioner was also the appellee/cross-appellant in the Circuit Court and New York Court of Appeals.

Respondent, Gruner + Jahr Printing and Publishing, also known as Gruner + Jahr USA ("Gruner + Jahr") was a defendant below, and the appellant/cross-appellee in the Circuit Court and New York Court of Appeals.

Sally Lee was a defendant in the trial court, but was not party to the appeal and is not a respondent in this Court.

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CITATION OF THE REPORTS OF OPINIONS IN THIS CASE

On February 28, 2000, the Circuit Court vacated the judgment of the District Court in reliance upon responses to questions certified to the Court of Appeals of the State of New York. *Messenger v. Gruner + Jahr, et al.*, 208 F.3d 122 (2d Cir. 2000) (hereinafter referred to as "*Messenger V*;" which contains "*Messenger IV*;" *See* Appendix A).

The Court of Appeals' responses to the certified questions were provided on February 17, 2000. *Messenger v. Gruner + Jahr, et al.*, 94 N.Y.2d 436 (*Messenger IV*). The Court of Appeals accepted certification on June 8, 1999 ("*Messenger III*;" *see* Appendix B), following the Circuit Court's certification on April 28, 1999. *Messenger v. Gruner + Jahr, et al.*, 175 F.3d 262 ("*Messenger II*;" *see* Appendix C). The underlying decision of the District Court was rendered on March 13, 1998. *Messenger v. Gruner + Jahr, et al.*, 994 F. Supp. 525 ("*Messenger I*;" *see* Appendix D).

BASIS FOR JURISDICTION

The Circuit Court's judgment (*Messenger V*), which issued on February 28, 2000, is final. No petition for reargument or motion for extension of time in which to file this petition has been filed. Accordingly, this Court has jurisdiction to review the Circuit Court's judgment by writ of certiorari, pursuant to 28 U.S.C. § 1254(1). Since final judgment was entered, the Circuit Court's jurisdiction to consider the District Court's decision (*Messenger I*) in connection with the appeal was proper under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The New York Civil Rights Act §§ 50, 51, as amended (the "Statute"), and the Constitutional provisions (the First and Fourteenth Amendments) are set forth verbatim in Appendix E.

STATEMENT OF THE CASE

In 1967, this Court reviewed the Statute, and stated:

> We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. . . .
>
> We, therefore, confidently expect that the New York courts will apply the statute consistently with the constitutional command.

Time Inc. v. Hill, 385 U.S. 374, 387-388, 397 ("*Time Hill*").

On February 17, 2000, the Court of Appeals stated in *Messenger IV*, 94 N.Y.2d at 442-443:

> Consistent with the statutory — and constitutional — value of uninhibited discussion of newsworthy topics, we have time and again held that, where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is an advertisement in disguise.[3] . . . That has been so even where a plaintiff's photograph, when juxtaposed with an article, could reasonably have been viewed as falsifying or fictionalizing plaintiff's relation to the article.

Conspicuously absent from the majority's opinion in *Messenger IV*, and never mentioned in *Messenger V*, is this Court's enunciation of the constitutional command in *Time Hill*. Rather, *Time Hill* is ignored by the courts below.

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3. *Arrington v. New York Times*, 55 N.Y.2d 433 (1982) ("*Arrington*"); *Howell v. New York Post*, 81 N.Y.2d 115 (1991) ("*Howell*"); *Finger v. Omni*, 77 N.Y.2d 138 (1990) ("*Finger*"); *Murray v. New York Magazine*, 27 N.Y.2d 406 (1971) ("*Murray*").

If left unchanged, the New York Courts will have created an exception for photographs juxtaposed with text — boosting one medium of expression over all other forms of speech — irrespective of the calculated falsehood of the content. Yet, precisely the opposite has heretofore been the rule: content, not form, is at issue, irrespective of the medium of expression. *United States v. O'Brien*, 391 U.S. 367 (1968). *Cf. Spence v. Wahington*, 418 U.W. 405 (1974); *Cohen v. California*, 403 U.S. 15 (1971).

The Court of Appeals struggles to support its artificial and incorrect distinction of types of speech, by averring that the *article* in issue in the case at bar "was concededly newsworthy."[4] *Messenger IV*, 94 N.Y.2d at 440 and 444. This conclusion is, however, flatly contradicted by the District Court's recognition that only the *subject matter not the content* was newsworthy:

> Plaintiff does not, and in any case could not, seriously dispute that the **subject** of the column at issue — teenage sex and its consequences — falls within the broad reach of the newsworthiness exception to the statute. [Emphasis added.]

Messenger I, 994 F. Supp. at 528 (footnote omitted).

Moreover, even assuming that the Court of Appeals were correct in labeling the article in issue as "admittedly newsworthy," such a label leaves unchanged the outcome under this Court's constitutional command. Indeed, the article in *Time Hill* was itself found to be newsworthy and a matter of "public interest," *Time Hill, supra*, 385 U.S. at 386 and 388. The standard of knowing fictionalization was nonetheless applied.

It is gravely feared that, absent this Court's interdiction, the courts below will have rendered the Statute a "dead letter"

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4. Petitioner never admitted that the article was newsworthy. Instead, she proffered evidence that there was never any actual incident and that the article was entirely fictitious, from the non-existent "letter to the editor" to the irresponsible advice given under the guise of professional therapy.

(as prophesized by Judge Bellacosa's dissent, *Messenger IV*, 94 N.Y.2d at 449) upon a Constitutionally impermissible basis. The apparent violation of this Court's confidence in the ability of the New York courts to follow the constitutional command, and the deleterious consequences to the rights of private citizens in the Internet Age, is critically at issue in this petition.

A. Factual Predicates for Petitioner's Claim

In 1995, fifteen year old petitioner thought she had the same rights as Julian Spahn to bar the publication of what "*purport*[*ed*] to be [her] biography." *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 328 (1966) ("*Spahn*").[5] She thought she had the same protections as the Hill family in *Time Hill* to obtain redress for emotional distress for the publication by a media defendant of a calculated falsehood about her. Apparently, however, she was wrong.

Pictures of petitioner were published in an article purporting to be about her non-consensual sexual affair with three men while she was intoxicated, leaving her possibly pregnant and potentially carrying a sexually transmitted disease. The article was not a general article about a topic, it was a purported letter to the editor from a single individual — petitioner. The letter purported to be Jamie's autobiography.[6]

The article is entitled: " I got trashed and had sex with three guys." It employs standard journalistic tools to identify the petitioner as the author of the purported letter to the editor, and as the person speaking to the editor, and hearing the editor's responses:

> "Wake up and face the facts: You made a pretty big mistake" [picture]

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5. Full history: *Spahn v. Messner*, 43 Misc. 2d 219, 250 N.Y.S.2d 529 (N.Y. Sup. Ct.), *aff'd*, 23 A.D.2d 216, 260 N.Y.S.2d 451 (1st Dep't 1965), *aff'd*, 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966), *aff'd on remand*, 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967). *Spahn* was determined after remand following this Court's determination of *Time Hill*.

6. The article in issue is appended as Appendix F.

"Even though you made a major mistake this time" [article]

"Afraid you're pregnant? See a doctor" [*picture*]

"*You* also need to see a doctor right away" [article]

"Don't try to hide — just ditch him and his friends" [picture]

"You deserve a lot better than him. In other words, its time to dump this zero — like yesterday" [article]

Yet petitioner never wrote such a letter. Petitioner never had such a sexual affair. Petitioner was never intoxicated and then involved in group sex. Petitioner never had any of the emotions that the article attributes to her. Indeed, none of this purported "autobiography" was true.[7]

Petitioner's autobiography was much simpler. She was a beautiful, aspiring model. She was just a child trapped in a reckless world of falsehoods paraded under the guise of "news."

Respondent publisher of the offensive article, stipulated that it never received parental consent. Indeed, respondent never sought consent, despite many consent forms in its possession.

At trial, defendant's Art Director admitted that Jamie was "supposed to be" the subject of the autobiography, and that he highlighted the word "sex" in the article because readers were interested in sex, and liked to read about sex.

By stipulation of the parties, the jury was charged under the standards articulated under *Chapadeau v. Utica Observer Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975) and returned a verdict in Jamie's favor on this basis. (Appendices G and H.)

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7. "As was found by the trial court, the book was replete with imaginary incidents, invented dialogue, dramatized portrayals and manipulated chronologies." *Messenger III*, 94 N.Y.2d at 445. The Court of Appeals was referencing *Spahn;* the **identical** finding is applicable here.

The jury found that the reasonable reader of this publication (12 to 19 year olds) believed that the story was Jamie's autobiography. (Appendix H.)

The jury also found that the respondent acted with gross irresponsibility in creating this belief, because the article was replete with publishing practices incorporated to successfully create the misimpression in the reader's mind that petitioner had submitted her autobiography for publication, in search of sound advice.[8]

Petitioner's emotional injury proximately caused by defendant's calculated falsehood was determined by the jury to be $100,000. The jury awarded nothing for reputational injury or economic loss. (Appendix H.) A defamation claim would have resulted in zero recovery.[9]

Petitioner also cross-appealed the District Court's refusal to admit evidence relevant to, and charges to the jury concerning, punitive damages and the fictionalization of the entire letter to the editor and advice. This refusal failed to consider the wealth of evidence that respondent's use of petitioner's photographs without prior written consent was not only "knowing" (the judicial standard twice articulated by the Court of Appeals)[10]

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8. The advice, however, was not even written by the editor, although carrying her picture as her signature. Indeed, no one at defendant's offices would take credit for the alleged "advice." Jamie sought to proffer evidence of the gross irresponsibility of the advice tendered, but the District Court refused to admit such evidence.

9. The jury's finding that petitioner suffered no economic loss or reputational injury is the death knell to defamation. Thus, absent the protections afforded under the Statute, petitioner would be without recourse.

10. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 410 N.Y.S.2d 282, 382 N.E.2d 1145 (1978) (actual knowledge or reckless disregard for the absence of written consent to use plaintiff's pictures held to be the standard); and *Welch v. Mr. Christmas, Inc.*, 57 N.Y.2d 143, 454 N.Y.S.2d 971, 440 N.E.2d 1317 (1982) (neither malice nor recklessness need be shown for recovery of exemplary damages under the Statute).

but that respondent intentionally, willfully and fraudulently induced petitioner to pose for the fabricated article, designed to depict petitioner in a salacious manner, simply to boost readership at her expense.

B. The Critical Nature of this Petition

The petitioner raises important First and Fourteenth Amendment questions of whether all publications that are labeled "newsworthy" can be, in whole cloth, excluded from the provisions of the Statute, and thereby immunized from liability in the State of New York. (*See, e.g.*, the *Amicus Curiae* Brief submitted by the Screen Actors Guild) (*See* App. I). The Court of Appeals below stated:

> Second, we have made clear that these sections [the Statute] do not apply to reports of newsworthy events or matters of public interest (*see, e.g., Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993); *Stephano* v *News Group Publs.*, 64 N.Y.2d 174, 184 (1984)).

Messenger IV, 94 N.Y.2d at 441.

This Court has held that the ruling in *Sullivan* applies to liability under the Statute in "parallel." *Gertz v. Welch*, 418 U.S. 323 at 334-335 n.6 (1974). Yet, the courts below have ignored the holding of *Gertz* which determines the gamut of First Amendment protection afforded the press based upon the individual's "*participation in the particular controversy giving rise to the defamation,*" *Gertz, supra* at 352, rejecting the Circuit Court's finding that the matter was of "significant public interest." In the case at bar, petitioner has absolutely no participation in the subject matter, especially since the matter was pure fiction.

In establishing immunity for photographs juxtaposed with text, the Court of Appeals indicated that it found no "inherent tension" between the *Spahn* holding of liability for intentional fictionalization of written words without photographs, and the *Arrington*[11] line of cases in which stock photographs were

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11. *Arrington, Howell, Finger* and *Murray.*

employed with newsworthy text. It is clear that the distinction is but of recent creation by the New York courts in their attempt to create a safe haven for the media by dodging the mandates of *Sullivan, Time Hill* and *Gertz.*

Moreover, the courts below appear to ignore the jury instructions and findings (see Appendices G & H) and the fact that they were predicated upon the *Chapadeau* standard. *See also Kaelin v. Globe International*, 162 F.3d 1036, 1040 (9th Cir. 1998).

The jury found that the case at bar does not involve mere juxtaposition of photographs and text. Rather, journalistic tools have been employed to create the impression that petitioner is speaking the quoted words, hearing the quoted responses, and living the story outlined in the article. Accordingly, the jury, when instructed under *Chapadeau*, found that ordinary readers would believe that the article was about the petitioner and that this belief was created with gross irresponsibility. These standards were never employed in the *Arrington* line of cases, as those cases involved a still photograph and nothing more.[12]

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12. *Arrington, Howell, Finger* and *Murray* each demonstrate the "external and objective criteria" used to evaluate a newsworthy article where the individual whose picture is employed, is *not* identified. Additionally, *Finger* pictured a healthy family of six with the "subject of caffeine-enhanced in vitro fertilization." *Arrington* showed a man of color in connection with an article about middle class people of color. *Murray* shows a picture of the plaintiff taken while he was attending the St. Patrick's day parade, in connection with an article about the parade. *Howell* showed the "incidental use" exception in connection with plaintiff's photograph together with Hedda Nussbaum, which had in fact occurred in public. Moreover, these cases all presented photographs in which no quotes were emanating from plaintiff's mouth, no journalistic tools were used to suggest a first person autobiographical narrative, and the subject matter was clearly real, not defamatory, and not salacious. There can be no "implication" without direct statements and/or extrinsic evidence that the photographs were " of and concerning" the parties whose photos were taken. *Rosenblatt v. Baer*, 383 U.S. 75, 81, 82 (1966). Therefore, the evidence was "constitutionally insufficient

(Cont'd)

Yet, the courts below ignored the standards imposed upon the jury and its findings of gross irresponsibility in falsely identifying petitioner with a fictional account. In essence, then, the courts below have created absolute immunity.

Additionally, the petitioner here is an aspiring model, and thus has a cognizable property interest in the use of her likeness. Property interests have been at the heart of invasion of privacy cases whether or not the privacy is protected under common law or by statute, and whether or not the person is a public figure. *The Right of Privacy*, by Warren and Brandeis, 4 Harvard Law Rev. p. 193 (1890). Under the Statute, the prevailing party's claim inevitably involves a property interest and/or a breach of contract. Thus the Statute merges the recognized doctrine of "commercial exploitation." *Binns v. Vitagraph*, 210 NY 51 (1913); *Time Hill, supra,* 385 U.S. at 386 *quoting Spahn, supra*, 18 N.Y. 2d at 328. *See also Flores v. Mosler Safe Co.*, 7 N.Y. 2d 276, 280-281 (1959); *Brinkley v. Casablancas*, 80 A.D.2d 428, 432 (1981).[13]

The media defendant at bar also falsely represented to petitioner's modeling agency, to induce them to provide petitioner for the photo shoot, that the pictures would be used in a positive manner for a "nice little story." The "story" was

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(Cont'd)
to support" a finding that the articles referred to those four plaintiffs in a manner that violated their constitutional rights to privacy and publicity. *Sullivan, supra*, 376 U.S. at 292. Lastly, there was no contract or property interest involved in those four cases.

13. A writer cannot be permitted to publish a libelous book and exploit a commercial profit by using someone's name to sell the merchandise. This type of commercial fraud was heretofore governed by the Statute. *See* Comments: *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, University of Chicago Law Review, Vol. 30, p. 722 at 727 n.20 citing N.Y. Civ. Rights Law §§ 50 & 51 (1963). The New York statute on the right of privacy "has the same practical effect as the property theory." *The Right of Privacy A Half Century's Developments*, 39 Michigan Law Review, 526 at 538 (1941) Louis Nizer.

obviously not "nice" but instead blatantly false. The photographs had improper "statements" attached to them, in contravention of the prior representations. This is "sufficient evidence" to permit the jury to conclude that the article was "specifically directed" by and/or "identified" petitioner. *Rosenblatt, supra*, 383 U.S. 75 at 84, 85 (1966). Indeed, the jury below so found.

Yet, the courts below have treated these jury findings as if they are irrelevant. Indeed, if there is absolute immunity without any jury question ever raised, as is the logical extension of the decisions below, then this Court's consistent rulings to the contrary have been — overruled. *Time Hill, supra*, 385 U.S. at 394, note 11 ("it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood").

Moreover, *Sullivan* made certain to discuss the historical nature of the freedom of the press, and separated the rights of public officials from those of private citizens. Since the creation of the First Amendment, it has been recognized that although public officials have no Constitutional rights to sue the press for libel and/or invasion of privacy, private citizens have retained such rights. *Respubica v. Oswald*, 1 Dallas, 319, 325 (1788); *Commonwealth v. Blanding*, 3 Pick 304, 313, 314, 20 Mass 304 (1825). Indeed, the dissent in *Gertz* suggests that a private party should have no hurdle upon demonstrating that the private party had been defamed or privacy had been invaded. *Gertz, supra*, 418 U.S. at 380-388. Petitioner is such a private citizen.[14]

Yet, instead of having a lighter burden of proof then a public figure (or a newsworthy figure like *Time Hill*), the courts below have raised the bar and immunized the media altogether. This is especially incorrect since the petitioner in fact met the *higher* standard of gross irresponsibility, as shown by the jury

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14. Moreover, the article in issue cannot be deemed "hot news" warranting protection under the First Amendment. *Rosenbloom v. Metromedia*, 403 U.S. 29, 40, 46 (1971). Nor is it "current news." *See Humiston v. Universal Film Manufacturing Co.*, 184 A.D. 467 at 469 (1919); *Hagler v. Democratic News*, 699 S.W.2d 96, 99-100 (1985) (police raid).

instructions and findings. (Appendix H.) Rather than recognize the findings by the jury under this higher standard, the courts below have instead created a rule *inverse* to that of *Gertz* — that the media has absolute immunity in using the photographs of a private citizen.

Finally, the question of "newsworthiness" should remain predominantly a question of federal law. This Court has stated that issues stemming from *Sullivan* which raise the First and Fourteenth Amendments, are of national "scope" to be determined by this Court. "The standards that set the scope of its principles cannot therefore be such that "'the constitutional limits of free expression in the Nation vary with state laws.' " *Rosenblatt, supra*, 383 U.S. at 84, 85, *quoting Pennekapp v. Florida*, 328 U.S. 331, 335 (1946). *See also Sullivan, supra*, 376 U.S. at 270.

"An independent examination of the whole record" by this Court is proper" so as to ensure [this Court] that the judgment does not constitute a forbidden intrusion on the field of free expression." *Sullivan, supra,* at 285, *quoting Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *also see, e.g., Wolston v. Reader's Digest Assn. Inc.*, 443 U.S. 157, 166, 168 (1979). The evidence in the record provides the "high degree of . . . probable falsity demanded by the New York Times." *Beckley Newspapers v. Hanks*, 389 U.S. 81, at 84 (1967), *quoting Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *also see Sullivan, supra*, 389 U.S. at 285.

C. The Proceedings Below

On February 23, 1998, *Messenger I* was decided by the District Court upon respondent's motion for summary judgment. The jury's verdict was presented on March 27, 1998. (*See* Appendix D.)

On April 28, 1999, *Messenger II* was decided by the Circuit Court by way of the presentation of the following certified questions to the Court of Appeals:

> 1. May a plaintiff recover under New York Civil Rights Law §§ 50 and 51 where the defendant uses

> the plaintiff's likeness in a substantially fictionalized way without the plaintiff's consent, even if the defendant's use of the image was in conjunction with a newsworthy item?[15]
>
> 2. If so, are there any additional limitations on such a cause of action that might preclude the instant case?

Messenger II, 175 F.3d 262, 266.

After accepting certification on June 8, 1999 (*Messenger III*), on February 17, 2000, *Messenger IV* was decided by a *per curiam* majority vote of the Court of Appeals, with a dissenting opinion by Judge Bellacosa.

On February 28, 2000, *Messenger V* was decided and the judgment of the District Court was vacated. The case was thereupon remanded to the District Court, and this petition timely filed.

REASONS FOR GRANTING THE WRIT

I. BY IMMUNIZING PHOTOGRAPHS FROM ALL OTHER FORMS OF SPEECH IRRESPECTIVE OF CONTENT AND INTENT, AND FINDING NO INHERENT CONSTITUTIONAL TENSION, THE COURTS BELOW HAVE VIOLATED THE FEDERAL CONSTITUTIONAL COMMAND.

In *Time Hill*, this Court reviewed the New York Courts' interpretation of the Statute in connection with a publication that involved photographs of the Hill family interwoven or juxtaposed with a small amount of text which created the false impression that the story was about them. In distinction, in

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15. The question begs the issue of newsworthiness. Indeed, the manner in which the question was framed by the Circuit Court rendered "newsworthiness of the item" a given, even though that was never a finding by the District Court, nor an admission by the petitioner. Rather, the petitioner argued, and continues to argue, that a fictitious article can never be "newsworthy." But since the rhetorical question was asked in that manner, the Court of Appeals improperly believed in the admission of newsworthiness, and bootstrapped its decision about this false proposition.

Messenger, the courts below immunized photographs interwoven and juxtaposed with a small amount of text that created the false impression that the story was about her.

In *Time Hill*, this Court established the standard for liability to be "knowledge of the falsity or in reckless disregard of the truth." *Time Hill, supra*, 385 U.S. at 388. This Court made clear that "where either result finds reasonable support in the record it is *for the jury*, not for this Court, to determine whether there was knowing or reckless falsehood." *Time Hill, supra*, 385 U.S. at 394 ft. note 11, emphasis added.

The *Messenger* jury found the respondent to have had knowledge of the falsity or reckless disregard for the truth. The jury determined that the ordinary reader would incorrectly believe that the article concerned and identified the petitioner, and that the media defendant acted with gross irresponsibility in creating that impression.

Yet, the Circuit Court and Court of Appeals made no mention of the jury's findings, nor the standard articulated by this Court in *Time Hill*.

Had *Time Hill* originated now, the New York courts would have summarily adjudged the media defendant free of liability, as if this Court had never spoken on the issue.[16]

By all appearances, the Circuit Court and Court of Appeals holdings, at odds with *Time Hill*, are constitutionally unsound.

In *Time Hill*, this Court clearly stated that the First Amendment as applied to the Statute will not shield a media defendant from liability for its calculated and/or knowing falsehoods. *Time Hill, supra*, 385 U.S. 389-390. How, then, can it be that the New York Courts have created such a shield in *Messenger*?

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16. On May 2, 2000, relying upon *Messenger IV*, the Southern District of New York summarily dismissed a claim under the Statute in connection with a television show. *Weber v. Multimedia Entertainment, Inc., et al.*, 97 Civ. 0682, 2000 U.S. Dist. LEXIS 5688 (2000).

The answer lies in the New York Court's synthesis of a different standard:

> Thus, it is clear that a Civil Rights Law §§ 50 and 51 claim does not lie where a plaintiff's photograph is used to illustrate a newsworthy article. There are two limitations: first there must be a real relationship between the article and the photograph . . . and second, the article cannot be an advertisement in disguise.

Messenger IV, 94 N.Y.2d at 444.

In other words, if the photographs appear to reasonably relate to the article, and the article does not appear to be an advertisement (*e.g.*, "buy XYZ beer") then, in the *Messenger* Court's view, there is no liability under the Statute. The problem, of course, is that any good editor will select a photograph that illustrates the article. Indeed, the desire is to connect the photograph with the text. This is precisely the testimony in the case at bar. The intent was to create the false impression that the article was about the person pictured. Obviously, then, there is a "real relationship" to the extent there is an illustration, even if the underlying implication is not real.

Messenger IV then notes (94 N.Y.2d at 444):

> Of course, a Civil Rights Law claim may lie if a plaintiff's picture is issued purely for trade purposes, and not in connection with a newsworthy article.

This convoluted paradox implicates Constitutional concerns. Between the Circuit Court and the Court of Appeals, apparently, the entire position of petitioner was lost. Petitioner *always* argued that the calculated falsehood of the defendant created liability under the "trade purposes" prong of the Statute. It would appear that the Circuit Court and Court of Appeals have acknowledged the principal, but ignored the result. It is logically impossible to find that the article was false, on the one hand, but to hold that it is newsworthy on the other. Apparently, however, the Circuit Court and Court of Appeals have done so.

The Circuit Court presented the certified question in a manner that misstates the facts and law by asking whether falsification may be a standard for "a newsworthy item." The error in the question also created an error in the answer. As indicated above, the petitioner has never admitted, nor did the District Court find, that the article was newsworthy. Rather, both agreed that the *subject matter* of teenage sex and alcoholism were newsworthy. This cannot boost a false story about a child's purported experiences with teenage sex and alcoholism into news. A completely invented story that falsely holds itself out as real, and incorrectly identifies petitioner as having sexual encounters with multiple partners and alcohol abuse, followed by potential pregnancy and diseases, cannot be treated with the same immunity as "news." False and fictional stories have never been news in the State of New York since *Binns* and *Spahn*. Until now.

The original standard, eroded away by the New York Courts, actually involved the question of whether the publication identified the person, and whether such identification was made with the requisite knowledge of the falsity when published. *Sullivan*, *supra*, 376 U.S. at 279-280; *Time Hill*, *supra*, 385 U.S. at 387-388. In *Time Hill*, this Court was careful to apply the same rules of *Sullivan* for "breathing space" supporting "free debate" of extreme value to our democracy. *Sullivan*, *supra*, at 271-272; *Time Hill*, *supra*, at 388-389. Yet blatant falsehoods about someone cannot, by definition, have such value.

Even assuming application of the "real relationship" standard, the definition of "real relationship" as applied by the Court of Appeals to the case at bar is Constitutionally vague. *Messenger IV*, 94 N.Y.2d at 442-443; *Coates v. City of Cinncinati*, 402 U.S. 611, 614 (1971). The misuse of photographs by placing false quotes indicating that the words are emanating from the person's mouth in the photograph, as contrived by respondent, is not "real," let alone sufficient for the term "real relationship."

Given these directives, the Circuit Court and Court of Appeals have, *inter alia*: (i) enhanced newsworthiness to uncharted territories inconsistent with this Court's rulings and interpretation of the First and Fourteenth Amendments; (ii) made it impossible for a private citizen to be protected from mental anguish resulting from the misuse of photographs connected with text in a manner that falsely identifies the citizen as the subject matter of the text; and (iii) separated the First Amendment analysis of speech based upon the medium of expression, irrespective of content and intent.

II. THE ARTICLE CANNOT BE CONSTITUTIONALLY IMMUNIZED FROM LIABILITY UNDER THE STATUTE AS ALLEGEDLY "NEWSWORTHY" BECAUSE ITS PUBLICATION FALLS UNDER THE TRADE PURPOSES PRONG OF THE STATUTE, CASE AUTHORITY, AND THE LEGISLATURE'S SILENT ADOPTION OF THE STANDARD.

The Statute embraces two specific prongs: trade purposes and advertisement in disguise. The definition of the initial aspect was first set forth by the Court of Appeals in 1913, in *Binns*. The "real relationship" test actually bridges the two:

> The last picture of the series had no connection whatever with any other place or person with any event. His alleged personal movements as exhibited in the now-well form of moving pictures had no relation to the other pictures, and it was not designed to instruct or educate those who saw it.

Binns v. Vitagraph Co., 210 N.Y. 51, 58 (1913). *See also Humiston v. Universal Film Manufacturing, Co.*, 189 App. Div. 467, 471, 178 N.Y.S. 752 (1919); *Lahiri v. Daily Mirror*, 162 Misc. 776, 782 (1937) ("the statute is violated if the photograph is used in connection with an article of fiction").

> We hold that the name and picture of the plaintiff were used by the defendant as a matter of business and profit and contrary to the prohibition of the

> statute. It is urged that there is danger of serious trouble in the practical enforcement of any rule which may be adopted in construing and enforcing the statute so far as it relates to purposes of trade. If there is any basis for the suggestion of danger in enforcing a part of the statute under consideration it is the duty of the legislature to repeal such part thereof, or so modify it as to define with greater particularity what it intends to be prohibited.

Binns, *supra*, at 58-59.

The Legislature declined the suggestion by the Court of Appeals to eliminate the standard that a "trade purposes" usage includes falsification of a newsworthy topic. Since 1913, the Legislature has twice amended the Statute (1983 and 1995). In neither instance has the operative language been eliminated. Neither the sale of photographs by third parties nor the inclusion of "voices" in the amendments are relevant to the case at bar. [Amendments: 1983, 1995.]

Accordingly, the Legislature's refusal to modify the Court of Appeals definition of "trade purpose" is a tacit adoption by the Legislature of the standards articulated in the *Binns* decision. This is particularly germane where, as here, the Court itself stated that it was the Legislature's "duty" to modify, or adopt by silence. *See Uniformed Firefighters Assn. v. Beekman*, 52 N.Y. 2d 463, 472 (1981); *also see stare decisis* doctrine of Legislature's acceptance of case precedent after amendment, *e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) *citing Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989); and *Lorrilard v. Pons*, 434 U.S. 575, 580 (1978).

Thus, the District Court's adoption of the standard applied by *Binns* is in accord with the Legislative intent, while the Circuit Court and Court of Appeal's standards are not.

III. THE TRADE PURPOSES STANDARD, AS PROPERLY APPLIED BY THE DISTRICT COURT, CANNOT BE OVERRULED BY THE CIRCUIT COURT AND COURT OF APPEALS WITHOUT VIOLATING PETITIONER'S CONSTITUTIONALLY RECOGNIZED AND PROTECTED PROPERTY INTEREST IN HER VALUABLE COMMERCIAL LIKENESS.

Binns, *Spahn*, *Time Hill*, *Brinkley*, *Pollard*, and *Messenger* each involve the same constitutionally protected property interests. Here lies the crucial "consideration of factors" or "other requirements of the statute" that are essential for raising a cause of action under the Statute. *Time Hill*, *supra*, 385 U.S. at 390; *Spahn*, *supra*, 21 N.Y. 2d at 127.

This Court reiterated the threshold for implicating the Statute in *Time Hill*, as follows:

> The statute was enacted in 1903 following the decision of the Court of Appeals in 1902 in *Roberson v. Rochester Folding Box., Co.*, 171 N.Y. 538, 64 N.E. 442. . . . It was grounded upon an alleged invasion "of privacy," defined by the Court of Appeals to be "the claim that a man has the right to pass through this world, if he wills, without having his picture published . . . or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers." 171 N.Y. at 554. The Court of Appeal traced the theory to the celebrated article of Warren and Brandeis, entitled *The Right to Privacy*, published in 1890. 4 Harv. L. Rev. 193.

Time Hill, 385 U.S. at 380. *See also Binns*, *supra*, 210 N.Y. at 55; *Spahn*, *supra*, 18 N.Y. 2d at 327; *Arrington*, *supra*, 55 N.Y. 2d at 435; *Finger*, *supra*, 77 N.Y. 2d at 141.

The intent of the legislature is best determined at the time the Statute is enacted. *Colonial Liquor Distributors v.*

O'Connnel, 295 N.Y. 129, 141 (1946). *See also Beers v. Hotchkins*, 256 N.Y. 41, 58 (1931); *Donahue v. Warner Bros., Pictures Dist. Corp.*, 2 Utah 2d 256, 272 P. 2d 177 (1954); and *Sutherland Stat Const.* §§ 49.08, 5th Ed.

Roberson made clear to the legislature that a civil/criminal statute was needed to cover two sets of situations. First was the need to cover improper advertisements by the use of photographs without the consent of the party who was filmed. The court reasoned that such use was improper if a property interest was being usurped. *Roberson, supra*, 171 N.Y. at 538. The second was to bar libel in the use of such photography. *Id.* at 557. *See also Humiston v. Universal Manufacturing Co.*, 189 A.D. 467, 472 (1st Dept. 1919).

Roberson relied on six English cases discussed by the leading authority on the subject. *Roberson, supra*, 171 N.Y. at 548-550; *The Rights of Privacy*, by Warren and Brandeis, 4 Harvard Law Review, p. 193 at 207-211 (1890). Those cases each relied on a property interest and/or breach of an implied contract. *Roberson, supra*, 171 N.Y. at 548-550.

One of those cases, *Pollard v. Photographic Co.*, L.R. 40 Ch. Div. 345 (J. North) is still of import. *Pollard* concerned whether a photographer who entered into a contract with plaintiff was barred from using her pictures for a profit. The Court found in favor of plaintiff, and enjoined the photographers' use of the photographs. Warren and Brandeis, who discuss the significance of the *Pollard* case at length, state, in relevant part:

> Of key import was that "Mr. Justice North integrated in the argument of the plaintiff's counsel the inquiry: " 'Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?' " and counsel for the plaintiff answered: " 'In that case there would be no trust or consideration to support a contract.' "

4 Harvard Law Review, at 208-209.

Later, the defendant's counsel argued that " 'a person has no property interest in his own features: short of doing what is libelous or otherwise illegal, there is no restriction on the photographer's using the negative.' " As noted by Warren and Brandeis:

> But the court, while expressly finding a breach of contract and/or trust sufficient to justify its interposition, still seems to have felt the necessity of resting the decision also upon a right of property in order to bring it within the line of those cases which were relied upon as precedent.

Warren and Brandeis, *supra*, at 209-210.

At page 209 ft. note 1 of Warren and Brandeis, *supra*, the concept of implied contracts and breach of confidentiality are discussed by Judge North at length:

> In conclusion Judge North states: "the phrase 'a gross breach of faith' used by Lord Justice Lindley in *Jack v. Priester*, 19 Q.B.D. 639 applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof."

North J., in *Pollard v. Photographic Co.*, 40 Ch. D. 345, 349-352 (1888).

Significantly, *Roberson* did not entail a prior contractual relationship between the photographer and the party whose picture was exploited. In distinction, however, the case at hand in fact involves pre-existing contractual and confidential duties that were breached by using the photographs in a manner inconsistent with the representations made to petitioner's modeling agency in inducing the agency to provide her, an underage model, at the shoot from which the photographs were obtained. Indeed, the "nice little couples story" that respondent represented to be the anticipated use somehow unilaterally became the salacious story in which the photographs were

actually used. The agency testified that had they been advised of the actual use in advance, petitioner would never have been sent on the shoot. Thus, the breach of contract issues, extant in *Pollard* and relied upon by Warren and Brandeis are raised in the case at bar. Unfortunately, however, the District Court, Court of Appeals, and Circuit Court gave short shrift to these historically underlying principles.

Accordingly, the failure of the courts below to recognize the principles of breach of contract, coupled with the fact that they failed to recognize and protect petitioner's image and livelihood dependent therefrom, is fatally incorrect.

The existence of the contractual underpinnings for the principles have also been recognized by the New York Courts prior to their departure from the rules enunciated in *Time Hill*. For example, the Appellate Division in *Binns* clearly recognized that Mr. Binns and the filmmaker of "saved by the Wireless" had a contractual relationship. *Binns v. Vitagraph*, 147 A.D. 783, at 786 (1st Dept. 1911). "He concedes that his name was to be used, and the show was to be and was in fact advertised as his own exhibition." *Id.*, 147 A.D. at 786. Therefore, there was an implied and or express contract between Mr. Binns and the owner of the film theater to use the photographs only as it related to the rescue by Mr. Binns

In addition, Warren Spahn is a famous baseball pitcher whose public figure status is well known. As such, he has the "additional light shed on this conduct in public." *Spahn*, 18 N.Y.2d at 328.

A public figure such as Warren Beatty, Heather Locklear, or Warren Spahn, lose their expectation of privacy and or property interest to the "unauthorized publication of his [or her] biography." *Spahn*, *supra*, 18 N.Y.2d at 328 (1966). Their "biography" lies outside the protection afforded by the Statute. Just like newsworthy events, however, this does not extend to what "purports to be his [or her] biography." *Id.*, 18 N.Y.2d at 328. A public figure retains an interest to the truthful publication

of his life. The same holds true to reporting news. "The fictitious" comes within the zone of the Statute. *Id.*, 18 N.Y.2d at 328.

The right of publicity is subsumed by the Statute, which includes within its scope of violations the commercial exploitation of the image and or property interest of the plaintiff that is directly linked to her livelihood. *See Brinkley v. Casablanca*, 80 A.D.2d 428, at 435-436 (1st Dept. 1981), citing *Haelan Labs v. Topps Chewing Gum*, 202 F. 2d 866, 869 (1953), *cert. denied*, 346 U.S. 816 (1953). *See also Guglielmi v. Spelling Goldberg Productions*, 25 Cal. 3d 860 at 864, 160 Cal. Rptr. 352, 603 P.2d 454 (1979).

It is crucial to note that the court found a cause of action in *Brinkley* because Casablancas, the president of Elite Model Management, had an agreement with the plaintiff which had been violated. "Under the agreement, Casablancas was obliged to furnish the model's photographs from which Galaxy would produce the posters. Galaxy's right to print, publish and vend the posters was conditioned upon Casablanca's obtaining the consent of the model's." *Brinkley, supra*, 80 A.D.2d at 429.

Key to the court's analysis in *Brinkley* was the recognition that she

> never authorized distribution of the particular photograph or poster. While she undoubtedly permitted photographs of herself to be taken which might be used on a poster for commercial sale, she reserved the right, prior to their commercial exploitation, to reject or approve the use to which the photographs would be put. As already noted, a model's photograph is customarily used only after a written release has been obtained.

Id., 80 A.D.2d at 434. Therefore, *Brinkley* was a classic breach of contract case with the defendants usurpation of commercial profit from the image of Ms. Brinkley.

The right to "earn a living" and to pursue a cause of action under the right of publicity, cannot be undermined by a wrongful extension of First Amendment immunity. Where, as here, a court below has incorrectly barred liability under a similar statute in Ohio, this Court has corrected the wrong, and reversed the decision to thereby impose liability, finding that the First Amendment cannot be used to immunize a media defendant where his right of publicity is at stake. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 at 574 (1977).

IV. THE ISSUES RAISED ARE FEDERAL AND CANNOT VARY AMONG THE STATES; THE WRIT SHOULD BE GRANTED TO MAINTAIN UNIFORMITY.

There is a significant variance between "hot news" newsreels or "current news" compared to matters that are outside the penumbra of First Amendment protection. The article before this court is not "hot news" as found in 1971 with the action of a police raid. *Rosenbloom, supra*, 403 U.S. at 40, 46; *Hagler v. Democratic News*, 699 S.W.2d 96, 99-100 (1985).

The antithesis was found by this court in *Gertz*. This Court did not find the matter to be of "significant public interest" as the plaintiff did not "thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Gertz, supra,* 418 U.S. at 352. *See also Wolston v. Reader's Digest Assn. Inc.*, 443 U.S. 157, 166-169 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 133-136 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 451-455 (1976).

Petitioner, unlike Mr. Hill in *Time Hill* or the public officials in *Sullivan*, cannot be conceived to be a public figure whether involuntary or voluntarily exposed to public scrutiny. *Khawar v. Globe International*, 19 Cal. 4th 254, 965 P.2d 696, 701, 702 (1998).

The N.Y. Court of Appeals has recognized the import of "current news" in the context of the Statute. In 1959, that Court had before it a photographic "physical juxtaposition" of an old newsworthy item that was used to advertise a product for safety. *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 280 (1959). That Court made clear to distinguish *Flores* with *Wallach*, a similar case save for the timing of the news. In the former, the event was "outdated" news, whereas the latter was "current." *Id.* at 282, distinguishing, *Wallach v. Bacharach,* 192 Misc. 979 (1948), *aff'd,* 274 App. Div. 919 (1948).

Similarly, in 1919 the N.Y. Appellate Division made certain to protect movies that were being shown in the movie theaters on a weekly basis. The Appellate Court reviewed the intent of the legislature and found that the "statute does not apply to the publication of a picture or name in a single set of films of actual events issued at one time for distribution in different parts of the country before different audiences as a matter of current news" (Emphasis added.) *Humiston v. Universal Film Manufacturing, Co.,* 189 App. Div. 467 at 474 (1919).

The case at bar is significantly distinguishable. The type of news recognized by this Court in *Rosenbloom* and *Time Hill* and by the Appellate Division in 1919 in *Humiston* can fairly be described as nearly identical. This is real news.

Fabricated soap operas for teenagers are not in the same category. The courts below are in error in making the article in issue immune from liability thereby giving the media the same type of First Amendment rights as current and actual ongoing events that are broadcasted by our newspapers and magazines. As heretofore stated, the issue is Federal in nature, and the state courts cannot abrogate to themselves the ability to modify the Federal Constitutional standards under the First Amendment in violation of this Court's command.

CONCLUSION

Petitioner respectfully prays that this Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeal of the Second Circuit in this matter.

Respectfully submitted,

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